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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 637

UNITED LIQUORS CORPORATION, ET AL., ~~PETITIONERS~~ Appellants

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, the appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment entered by the district court on August 1, 1956, adjudging that appellants had combined and conspired to restrain interstate commerce in the sale of alcoholic beverages in Memphis, Tennessee in violation of Section 1 of the Sherman Act, 15 U. S. C. 1, and granting injunctive relief. The complaint, charging such violations by appellants and others,[1] was filed on June

[1] The complaint named as parties (1) the appellants, who are liquor wholesalers, (2) the wholesalers trade association, as to

30, 1955. After trial, the district court on July 31, 1956, entered findings of fact and conclusions of law (J. St. 6a–19a), and on September 14, 1956, the court delivered an oral opinion denying appellant's motion to stay the judgment (J. St. 1a–5a). This motion was subsequently denied, first by Mr. Justice Reed on September 19, 1956 (see App., *infra*, pp. 11–13) and then by the Chief Justice on September 25, 1956.

In July 1949 retailers of alcoholic beverages in Memphis organized an association in order to "fix and maintain wholesale and retail" liquor prices in Memphis (Fdg. VI; Tr. 402–03, 505–06, 936–38). Shortly thereafter, as a result of joint meetings with the retailers, the wholesalers, including appellants, offered to discontinue (Tr. 409–11), and did in fact discontinue, quantity discounts to the retailers (Fdgs. VII, XV).[2] The wholesalers also promised to adhere to a formula for suggested retail prices in their price lists (Fdg. VII; Tr. 243, 246, 270), which prices were adjusted in several instances after conferences between representatives of the wholesalers' and retailers' association (Fdg. XI; Tr. 180–87). The wholesalers' association exhorted its members "to conform

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which there was a default judgment, and (3) liquor retailers and their trade association, who consented to a decree enjoining the complained of activities.

[2] Although a state regulation (promulgated in October 1949), which prohibited wholesale quantity discounts, was repealed in December 1950, wholesalers did not resume discounts in Memphis until November or December 1951 (Fdgs. IV, XIV). And in the summer of 1951 the Memphis wholesalers, at a meeting with retailers, had assured the latter that discounting, being resumed in other Tennessee counties because of the competition of Nashville wholesalers, "would not spread to Shelby County," *i. e.*, Memphis (Fdg. XIV).

to agreed upon mark-ups" and investigated one wholesaler suspected of non-compliance (Fdg. XIII; Tr. 214–17). In March 1951 a small wholesaler, who marketed a brand at prices not approved by the retailers' or the wholesalers' association, went out of business after a boycott which had been induced by the wholesalers (Tr. 421–27) and which immediately followed threats of such action at a joint meeting of the associations (Fdg. XII; Tr. 419–27, 621–28, 633–35).

Early in 1950 (Tr. 507), the retailers' association undertook "to get the distilleries to fair-trade and to stabilize the price market in Memphis" (Tr. 505–06). See also Tr. 433–35, Fdgs. VIII, XV. Distillers were urged to enforce their contracts (Fdg. X; GX–123, received in evidence, Tr. 102–104), and wholesalers who sold non-fair trade brands were subjected to concerted pressures by the retailers (Fdg. VIII; Tr. 507–11, 884). These efforts, which had been successful during 1950 and early 1951 (Fdgs. VIII, XV), were temporarily halted in May 1951 by this Court's decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, but were resumed in 1952 after passage of the McGuire Act (Fdg. XVI; Tr. 996–97, 1012–13).

Lack of appreciable success in again securing fair trade contracts (Fdg. XVI) prompted the retailers formally to enlist the "active support and assistance" of the wholesalers in influencing their suppliers to enter into such contracts (Fdg. XVII). Each of the appellant wholesalers, "fully aware" of the retailers' purpose to establish uniform prices through fair trade contracts, agreed to urge his suppliers to "fair trade"

(Fdg. XVII), and in fact the wholesalers did so urge many of their suppliers (Fdg. XX). Thus, at the request of the retail association's fair trade committee, the wholesalers wrote letters to the Committee endorsing fair trade (Tr. 350–51; see Tr. 189–92), which were read at the association meetings (Tr. 523). Appellant Klein stated that he would do "whatever he could" with his suppliers (Tr. 520), for, as he said in his letter of January 28, 1954, "we [the wholesalers] are just as anxious as you are to see the entire business stabilized" (GX–46, received in evidence, Tr. 37–38). Appellant Perlberg was "very much in favor of it" (Tr. 523) and hoped the Memphis market could be "cleared up" (Tr. 523–24) through fair trade. Another wholesaler testified that he would "do anything I could to help straighten out a market that certainly needed straightening out" and that fair trade "was the only thing that would straighten out this market for everybody" (Tr. 1169–70). On at least one occasion, appellant Klein participated in the negotiation and signing of a fair trade contract between a distiller and retailers (Tr. 481–91; see Tr. 532). The wholesalers carried on a large correspondence with the distillers urging fair trade, reporting pertinent information, and sometimes furnishing the distillers with the retailers' suggested prices, which were then established as the distillers' fair trade prices (Fdgs. XX, XXV). Moreover, the retailers pressed the distillers "through their * * * wholesalers in Memphis," including appellants, "to enforce adherence to" the contracts, by securing injunctions against price-cutting retailers (Fdg. XXV; Tr. 1131).

Simultaneously, the retailers' association and its members were engaged in an "all-out effort" to force the distillers to "fair trade" their products, by removing from retail stores all advertising of non-fair-traded brands, by giving such brands the worst possible shelf position, and by making every effort to switch customers from such brands (Fdgs. XVIII, XIX). "Squads" of retailers were sent by the association to make "periodic visits" to retail outlets (Fdg. XIX; Tr. 525–27, 749, 753–56). As a result, sales of many non-fair-traded brands declined "very substantially" (Fdgs. XIX, XXII), and "virtually all" distillers distributing through appellants fair-traded their brands in the Memphis trading area (Fdg. XXI),[3] although many limited their contracts to Memphis alone or fair-traded in Memphis at prices which "varied widely" from prices prevailing elsewhere in Tennessee (Fdg. XXIV).

ARGUMENT

1. The first question presented by appellants (J. St. 2) appears to be an attack on the court's determination that appellants' participation in a conspiracy to fix, maintain and stabilize prices of alcoholic beverages shipped in interstate commerce for sale in the Memphis trading area constituted a violation of the Sherman Act (see Fdg. XXVI; Concl. of Law II, J. St. 18a).

[3] Prior to March 1954, there were only two or three manufacturers who were fair trading their products in this area (Fdg. XXI).

We submit that, on the issue of violation, *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, is conclusive. In that case certain wholesalers, retailers, and distillers were indicted for conspiring to raise, fix, and maintain retail prices of alcoholic beverages sold in the State of Colorado, by means which included agreement among Colorado retailers and wholesalers to "persuade and compel" out-of-state producers to enter into fair trade contracts on alcoholic beverages shipped into the state. This Court held that since the means adopted for effectuating the conspiracy "reached beyond the boundaries of Colorado," it was immaterial that the ultimate object of the conspiracy was the fixing or maintenance of local retail prices. 324 U. S. at 298. The Court also held that the conspiracy was not within the exemptions from the Sherman Act given by the Miller Tydings Act, because these exemptions do not apply to agreements among competitors, *i. e.*, agreements among retailers and agreements among wholesalers, to enter into "fair trade" contracts. *Id.* at 296.

The second question presented (J. St. 2–3)—whether it is a violation of the Sherman Act for wholesalers to discuss at their meetings the "desirability" that their suppliers adopt fair trade contracts and that each wholesaler recommend this policy to its own suppliers—rests on factual assumptions inconsistent with the court's findings. The assumption which underlies this question is that, although appellants admittedly had been parties to a price-fixing conspiracy from early 1949 to late 1951 (J. St. 4), the conspir-

acy was abandoned in 1951, and that their participation in any price-fixing conspiracy is therefore to be tested solely by what they did after 1951. Appellants were the only parties who went to trial. Accordingly, the court's findings setting forth the various conspiratorial acts and developments during the period 1949–1954 necessarily mean that the court found that the conspiracy in which the appellants were engaged was a continuing one from its inception in 1949 to the filing of the Government's complaint. Furthermore, no evidence of abandonment in 1951 was introduced, and abandonment of a continuing conspiracy will not be presumed in the absence of "definite proof to that effect." *Local 167* v. *United States,* 291 U. S. 293, 298.

The fact that the conspirators were unable to achieve their objectives for a temporary period following the decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, does not even suggest that the conspiracy itself was abandoned. The principal objective was "to achieve a completely rigid price structure on all alcoholic beverages sold in the Memphis trading area" (Fdg. XV), and diverse means were used for achieving this objective. The conspiracy was in no respect terminated when appellants, after discontinuing quantity discounts pursuant to the conspiracy, resumed the practice of granting such discounts.

The questions of substantive law said to be presented, constitute, as appellants concede "[t]o a certain extent" (J. St. 17), an attack on the district

court's findings of fact. These questions involve review by this Court of the entire evidence, oral and documentary. This attack is made in the face of the district court's observation that the evidence was "overwhelmingly in the Government's favor" (J. St. 4a). Appellants have also not even attempted to show error in the findings, notwithstanding the provision that a trial court's findings of fact shall not be set aside "unless clearly erroneous" (Rule 52 (a), Federal Rules of Civil Procedure).

2. In the third and fourth questions presented, appellants attack as innappropriate the prohibition, for a period of three years, against distributing suggested resale prices, and the prohibition, for a period of five years, against entering into fair trade contracts (J. St. 3).[4]

Issuance of suggested retail price lists was an "integral part" of appellants' conspiracy (J. St. 1a), and the court below concluded that an injunction prohibiting use of such lists was "very necessary" to prevent future violations of the statute (J. St. 2a). Under facts similar to those here, such an injunction has been held to be an appropriate type of relief. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 717–718. Inducing or compelling others to enter into fair trade contracts was also a central element in appellants' conspiracy. In *Bausch & Lomb* the district court had likewise enjoined for a limited period the making of fair trade contracts. In sustaining this

[4] Question 4, as stated, embodies the erroneous conspiracy-abandonment assumption. The fifth question (J. St. 3) explicitly challenges the sufficiency of the evidence.

prohibition, this Court said: "Equity has power to eradicate evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole." 321 U. S. at 724.

Appellants urge that the injunctive provisions will put them at a competitive disadvantage vis-à-vis Consolidated Distributors, the largest Memphis wholesaler. The asserted competitive disadvantages are purely conjectural, and the court, having retained jurisdiction to modify its judgment (J. St. 24a), can appropriately modify the prohibitions if actual experience demonstrates that they work an undue hardship on appellants. Appellants cannot legitimately complain because restrictions, from which a competitor is free, were imposed in order to restore a free and competitive market to the Memphis area. Not only had the conspiracy subjected this competitor to boycotts, which caused a very substantial decline in its 1954 sales (Fdgs. XIX, XX), but this competitor had "at all times scrupulously avoided complicity in the matters complained of by the Government in this litigation" (J. St. 5a).

We submit that the relief granted in the instant case was well within the "large discretion" vested in district courts "to model their judgments to fit the exigencies of the particular case." *International Salt Co.* v. *United States,* 332 U. S. 392, 400–401.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no

substantial question. The judgment of the district court should be affirmed.

Respectfully submitted,

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JANUARY 1957.

APPENDIX

Supreme Court of the United States

UNITED STATES OF AMERICA

v.

UNITED LIQUORS CORPORATION, ET AL.

MOTION FOR STAY

In the above case there has been presented to me a motion to stay the effectiveness of the final judgment entered by District Judge Boyd of the Western District of Tennessee.

The judgment was entered in a suit against defendants brought under § 1 of the Sherman Act, charging defendants with a conspiracy to fix and maintain prices.

By the findings of fact the District Court determined that the defendants had conspired with a retail association of liquor dealers to eliminate price cutting and establish uniform prices, mark-ups and profit margins on alcoholic beverages sold in the Memphis trading area. It was further found that each defendant wholesaler was fully aware of the purpose to use fair trade agreements as devices for establishing and enforcing adherence to uniform retail prices. It was further found that said conspiracy was carried out by members of the Retail Package Stores Association through organized efforts to increase the sales of the fair-traded brands against non-fair-traded brands. It was found that these efforts were successful. It was further found that defendant wholesalers

participated in obtaining the institution of fair trade prices by the manufacturers.

Upon reaching the conclusion that the defendants had participated in an unlawful combination and conspiracy to restrain trade in interstate commerce in the sale of alcoholic beverages, the court entered the judgment which is sought to be stayed. In summary, the judgment enjoined the defendants, jointly and severally, from furthering any contract or program to stabilize and control prices, eliminate discounts in sales, induce or coerce any person to establish or enforce adherence to prices, or communicate with any manufacturer in an effort to induce the establishment of minimum or suggested resale prices. The trial court overruled defendants' motion to stay this judgment pending appeal.

For purposes of this motion, here, defendants object to paragraphs V (A) and VI (A) of the judgment. Paragraph V (A) restrains them from disseminating "price lists or other price information containing minimum or suggested resale prices, mark-ups, or margins of profit for alcoholic beverages to be sold or offered for sale to third persons." Under paragraph VI (A) of the judgment, defendants are enjoined for five years from entering into or adhering to any fair trade contract "which purports to fix or control the resale price of any alcoholic beverage in the Memphis trading area."

Defendants contend that these limitations on their activities must seriously affect their ability to compete with other wholesalers who have not been enjoined from such acts, that there is danger that producers of alcoholic beverages will withdraw from defendants their franchise or agency for distribution, and that they will suffer irreparable injury if compelled to abide by the terms of the judgment until such time as

review may be had in this Court under the provisions of 15 U. S. C. § 29. Defendants alone file supporting affidavits.

The defendants have been found to have violated the antitrust laws and the decree has been framed by the judge of the trial court to correct the evils which resulted from the acts found unlawful. In framing a decree a judge has authority to enjoin actions otherwise lawful when such action is deemed by him necessary to correct the evil effects of unlawful conduct. *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 88–89; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 724. The decree here leaves open the opportunity to defendants to carry on their usual business of selling liquor at wholesale, prohibiting only those selling methods which it was thought would continue the conspiracy to control resale prices and the effects of that conspiracy.

Weighing the economic harm and the "fear" of future irreparable injuries flowing to defendants from the existence of the decree, during the pendency of their direct appeal to this Court, against the public detriment which would result from a continuation of unlawful price fixing, the motion for a stay is denied. Cf., *Yakus* v. *United States*. 321 U. S. 414, 440–441.

(Signed) STANLEY REED,
Associate Justice,
Supreme Court of the United States.

SEPTEMBER 19, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1957